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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

Case No. 3:07-md-1827 SI

MDL No. 1827

This Document Relates to:

ALL DIRECT PURCHASER ACTIONS

**DIRECT PURCHASER PLAINTIFFS'
NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS SETTLEMENT WITH
DEFENDANTS EPSON IMAGING
DEVICE CORPORATION AND EPSON
ELECTRONICS AMERICA, INC.;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: July 14, 2010

Time: 10:00 a.m.

Ctrm: 10, 19th Floor

The Honorable Susan Illston

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1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on July 14, 2010, at 10:00 a.m., in the Courtroom
4 of the Honorable Susan Illston, United States District Judge for the Northern District of California
5 located at 450 Golden Gate Avenue, San Francisco, California, the Direct Purchaser Plaintiffs
6 will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for entry
7 of an Order:

- 8 1. Preliminarily approving the partial class action settlement with Epson
9 Imaging Device Corporation and Epson Electronics America, Inc.;
- 10 2. Directing distribution of notice of the settlement to the class and providing
11 class members with the opportunity to opt-out of or object to the settlement; and
- 12 3. Setting a schedule for the final settlement approval process.

13 The grounds for this motion are that the proposed class settlement is fair,
14 reasonable, and adequate, and that the proposed class satisfies the certification requirements for a
15 settlement class. This motion is based on this Notice of Motion and Motion, the supporting
16 Memorandum of Points and Authorities, the accompanying Declaration of Eric B. Fastiff, the
17 LCD Direct-Purchaser Class Settlement Agreement, any papers filed in reply, the argument of
18 counsel, and all papers and records on file in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23, Direct Purchaser Plaintiffs
3 (“Plaintiffs”) hereby move this Court for an order preliminarily approving a class settlement
4 reached with defendants Epson Imaging Devices Corporation (“EID”) and Epson Electronics
5 America, Inc. (“EEA”) (collectively “Epson”). Under the settlement, Epson will pay class
6 members \$7 million in exchange for a release of class members’ claims. According to Epson’s
7 documents and representations made during settlement discussions, this amount represents
8 approximately 23% of Epson’s sales of TFT-LCDs that were billed to and/or shipped to
9 customers located in the United States during the period covered by the settlement, excluding
10 sales to Motorola which filed its own action. Additionally, Epson’s sales remain in the case for
11 purposes of computing Plaintiffs’ treble damages claim against the non-settling defendants.
12

13 This settlement is substantially similar to Plaintiffs' settlement with Chunghwa
14 Picture Tubes, Ltd. ("Chunghwa"), which the Court preliminary approved on May 3, 2010.

15 The question at the preliminary approval stage is not whether the settlement is fair,
16 reasonable and adequate. Rather, the question is whether the settlement is within the range of
17 possible approval to justify sending and publishing notice of the settlement to class members and
18 scheduling final approval proceedings. The settlement here was reached after extensive arm's-
19 length negotiations between experienced and informed counsel, and easily meets the standards for
20 preliminary approval.

II. PROCEDURAL HISTORY

22 This multidistrict litigation arises from a conspiracy to fix the prices of Thin Film
23 Transistor-Liquid Crystal Display (“TFT-LCD”) products. *See* Declaration of Eric B. Fastiff in
24 Support of Motion for Preliminary Approval of Class Settlement with Defendant Epson Picture
25 Tubes, Ltd. (“Fastiff Decl.”), ¶ 2. The Court has certified the Direct Purchaser Plaintiff class and
26 is familiar with the procedural and legal issues resolved thus far.

27 On November 5, 2007, Plaintiffs named EEA and EID as defendants in their
28 Consolidated Complaint. *Id.*, ¶4. Subsequently, Plaintiffs entered into a tolling agreement with

1 EID, and EID was dismissed without prejudice from the Direct Purchaser actions. *Id.*; see Order
 2 Dismissing EID from Direct Purchaser Actions, Jan. 15, 2008 (Dkt. 434). On August 25, 2009,
 3 Plaintiffs served Epson with a Notice of Intent to terminate the tolling agreement with EID, and
 4 thereafter filed a Second Amended Consolidated Complaint adding EID as a defendant. *Id.*, ¶ 4.
 5 EEA and EID answered the Second Amended Consolidated Complaint on January 6, 2010. Class
 6 Counsel commenced settlement negotiations with Epson's counsel in February 2010. *Id.*, ¶ 6.
 7 These negotiations consisted of multiple telephonic and face-to-face conferences conducted on an
 8 arm's-length and non-collusive basis among counsel who are experienced in antitrust law and
 9 class actions.¹ *Id.* On March 19, 2010, Plaintiffs and Epson reached agreement on the principal
 10 terms of settlement. *Id.* The terms of the settlement were vigorously negotiated. *Id.* Plaintiffs
 11 and Epson formalized their settlement agreement on May 7, 2010 by signing the LCD Direct-
 12 Purchaser Class Settlement Agreement (the "Agreement") (attached to the Fastiff Decl. as
 13 Exhibit A). It is substantially similar to Plaintiffs' settlement agreement with Chunghwa. *Id.*,
 14 ¶ 6.

15 III. **TERMS OF THE SETTLEMENT**

16 A. **Proposed Class Definition**

17 The proposed settlement class is:

18 All persons and entities who, between January 1, 1999 and
 19 December 31, 2006, directly purchased a TFT-LCD Product in the
 20 United States from any defendant or any subsidiary or named
 21 affiliate thereof, or any named co-conspirator. Excluded from the
 22 Class are defendants, their parent companies, subsidiaries, named
 23 affiliates, any named co-conspirators, all governmental entities, and
 24 any judicial officer presiding over this action and the members of
 his/her immediate family and judicial staff.

25 The Agreement defines "TFT-LCD products" to mean TFT-LCD panels and TVs, monitors, and
 26 notebook computers containing TFT-LCD panels. Agreement, ¶ 2.

27 B. **Consideration**

28 The terms of the proposed class settlement are set forth fully in the Agreement.

¹ Epson is represented by Melvin Goldman and Stephen Freccero of Morrison & Foerster. Fastiff Decl., ¶ 6.

1 Epson has agreed to pay \$7 million in exchange for its dismissal with prejudice and a release of
 2 claims. Agreement, ¶ 16. This money has already been deposited into an escrow account and is
 3 earning interest for the benefit of class members. Fastiff Decl., ¶ 8. Epson has completed its
 4 production of documents in response to Plaintiffs' written requests. To date, EEA and EID have
 5 collectively produced over 1.1 million pages of documents to Plaintiffs, including transaction data
 6 relating to Epson's sales and purchases of TFT-LCDs, and documents produced to the
 7 Department of Justice during the course of the government's investigation. *Id.* ¶ 7. For
 8 depositions of Epson employees, counsel for Epson has agreed to accept service of all deposition
 9 notices on behalf of Epson employees, to the extent permitted by applicable law. *Id.*

10 **C. Release**

11 Upon final approval of the settlement, Plaintiffs and class members will release all
 12 claims they have against Epson "concerning the manufacture, supply, distribution, sale or pricing
 13 of TFT-LCD Products" as of May 7, 2010 (*i.e.*, the date the Agreement was executed).
 14 Agreement, ¶ 13. However, the release does not preclude Plaintiffs from pursuing claims against
 15 other defendants arising from the sale of finished TFT-LCD Products by other defendants, or their
 16 co-conspirators, which contain Epson's TFT-LCD panels. *Id.* Further, the release does not
 17 include claims for product defect, personal injury, or breach of contract. *Id.*, ¶¶ 13, 15.

18 **IV. LEGAL ARGUMENT**

19 **A. Class Action Settlement Procedure**

20 A class action may not be dismissed, compromised, or settled without the approval
 21 of the Court. Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a defined
 22 procedure and specific criteria for approval of class action settlements. The Rule 23(e) settlement
 23 approval procedure describes three distinct steps:

- 24 1. Certification of a settlement class and preliminary approval of the proposed
 25 settlement;
- 26 2. Dissemination of notice of the settlement to all affected class members;
 27 and
- 28

1 3. A formal fairness hearing, also called the final approval hearing, at which
 2 class members may be heard regarding the settlement, and at which counsel may introduce
 3 evidence and present argument concerning the fairness, adequacy, and reasonableness of the
 4 settlement.

5 This procedure safeguards class members' procedural due process rights and
 6 enables the Court to fulfill its role as the guardian of class interests. *See 4 Newberg on Class*
 7 *Actions* §§ 11.22, *et seq.* (4th ed. 2002) ("Newberg") (describing class action settlement
 8 procedure).

9 The Court has already certified a substantially similar settlement class, and this
 10 settlement is assumed into it.

11 **B. Standards For Settlement Approval**

12 Rule 23(e) requires court approval of any settlement of claims brought on a class
 13 basis. "[T]here is an overriding public interest in settling and quieting litigation . . .
 14 particularly . . . in class action suits which are now an ever increasing burden to so many federal
 15 courts and which frequently present serious problems of management and expense." *Van*
 16 *Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Churchill Village, LLC v.*
 17 *General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373,
 18 378 (9th Cir. 1995); and *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

19 The purpose of the Court's preliminary evaluation of the proposed settlement is to
 20 determine whether it is within "the range of reasonableness," and thus whether notice to the Class
 21 of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are
 22 worthwhile. Preliminary approval should be granted where "the proposed settlement appears to
 23 be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does
 24 not improperly grant preferential treatment to class representatives or segments of the class and
 25 falls within the range of possible approval." *In re NASDAQ Market Makers Antitrust Litigation*,
 26 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

27 The approval of a proposed settlement of a class action is a matter of discretion for
 28 the trial court. *Churchill Village, L.L.C.*, 361 F.3d at 575. In exercising that discretion, however,

1 courts recognize that as a matter of sound policy, settlements of disputed claims are encouraged
 2 and a settlement approval hearing should “not be turned into a trial or rehearsal for trial on the
 3 merits.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert.*
 4 *denied sub nom. Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217 (1983). Furthermore, courts must
 5 give “proper deference” to the settlement agreement, because “the court’s intrusion upon what is
 6 otherwise a private consensual agreement negotiated between the parties to a lawsuit must be
 7 limited to the extent necessary to reach a reasoned judgment that the agreement is not the product
 8 of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement,
 9 taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*,
 10 150 F.3d 1011, 1027 (9th Cir. 1988) (quotations omitted).

11 To grant preliminary approval of this class action settlement, the Court need only
 12 find that the settlement falls within “the range of reasonableness.” *Newberg* § 11.25. The
 13 *Manual for Complex Litigation (Fourth)* (2004) (“*Manual*”) characterizes the preliminary
 14 approval stage as an “initial evaluation” of the fairness of the proposed settlement made by the
 15 court on the basis of written submissions and informal presentation from the settling parties.
 16 *Manual* § 21.632. The *Manual* summarizes the preliminary approval criteria as follows:

17 Fairness calls for a comparative analysis of the treatment of the
 18 class members vis-à-vis each other and vis-à-vis similar individuals
 19 with similar claims who are not in the class. Reasonableness
 20 depends on an analysis of the class allegations and claims and the
 21 responsiveness of the settlement to those claims. Adequacy of the
 22 settlement involves a comparison of the relief granted to what class
 23 members might have obtained without using the class action
 24 process.

25 *Manual* § 21.62. A proposed Settlement may be finally approved by the trial court if it is
 26 determined to be “fundamentally fair, adequate, and reasonable.” *City of Seattle*, 955 F.2d at
 27 1276. While consideration of the requirements for *final* approval is unnecessary at this stage, all
 28 of the relevant factors weigh in favor of the Settlement proposed here.² As shown below, the

27 ² Plaintiffs will address in detail each of the factors required for final settlement approval in their
 28 Motion for Final Approval of the Settlement, to be submitted following the issuance of Class
 Notice.

1 proposed Settlement is fair, reasonable and adequate. Therefore, the Court should allow notice of
 2 it to be disseminated to the Class.

3 **C. The Proposed Settlement Is Within The Range Of Reasonableness**

4 Plaintiffs' proposed settlement with Epson meets the standards for preliminary
 5 approval. First, this settlement is entitled to "an initial presumption of fairness" because it is the
 6 result of arm's-length negotiations among experienced counsel. *Newberg* § 11.41. Second, the
 7 consideration agreed to—a \$7 million cash payment that is already earning interest—is
 8 substantial, particularly in light of the volume of Epson's sales in the United States. The
 9 \$7 million payment represents approximately 23% of Epson's sales billed and/or shipped to
 10 customers located in the United States (excluding Motorola which filed its own case). Fastiff
 11 Decl., ¶ 8. This recovery is substantially more favorable than settlements approved in other price-
 12 fixing cases. *See, e.g., In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa.
 13 2004) (granting final approval to settlement where recovery was 1.62% of sales); *In re Plastic*
 14 *Tableware Antitrust Litig.*, No. 94-CV-3564, 1995 WL 723175, at *1 (E.D. Pa. Oct. 25, 1995)
 15 (granting final approval to settlement where recovery was 3.5% of sales). Third, because the non-
 16 settling defendants remain jointly and severally liable for all damages caused by the conspiracy,
 17 including damages from Epson's sales, this settlement does not reduce the total amount of
 18 damages recoverable from the non-settling defendants in this litigation. *See In re Corrugated*
 19 *Container Antitrust Litig.*, No. M.D.L. 310, 1981 WL 2093, at *17 (S.D. Tex. June 4, 1981).

20 **V. PROPOSED PLAN OF NOTICE**

21 To promote efficiency, the Epson and Chunghwa settlements will be noticed
 22 together. Rule 23(e)(1) states that, "[t]he court must direct notice in a reasonable manner to all
 23 class members who would be bound by a proposed settlement, voluntary dismissal, or
 24 compromise." Notice of a proposed settlement must inform class members of the following:
 25 (1) the nature of the pending litigation; (2) the general terms of the proposed settlement; (3) that
 26 complete information is available from the court files; and (4) that any class member may appear
 27 and be heard at the fairness hearing. *See Newberg* § 8.32. The notice must also indicate an
 28 opportunity to opt-out, that the judgment will bind all class members who do not opt-out, and that

1 any member who does not opt-out may appear through counsel. Fed. R. Civ. P. 23(c)(2)(B).

2 The form of notice is “adequate if it may be understood by the average class
 3 member.” *Newberg* § 11.53. Notice to the class must be “the best notice practicable under the
 4 circumstances, including individual notice to all members who can be identified through
 5 reasonable effort.” *Amchem Prods.*, 521 U.S. at 617. Publication notice is an acceptable method
 6 of providing notice where the identity of specific class members is not reasonably available. *See*
 7 *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citing *Manual*
 8 § 21.311).

9 Plaintiffs propose that the notice plan adopted and approved by the Court include:
 10 (1) direct notice given by mail or email to each class member who can be identified by reasonable
 effort;³ (2) a summary notice published in the national edition of *The Wall Street Journal*; and
 11 (3) the posting of both forms of notice on a public website maintained by the Class Administrator.
 12 This is the same plan of notice that the Court approved with the Chunghwa settlement. Fastiff
 13 Decl., ¶ 10.

14 The content of the proposed Class Notice, which consists of a summary notice and
 15 a long form notice, fully complies with due process and Rule 23. (The proposed summary and
 16 long form notices are attached hereto as Exhibits A and B, and to the accompanying proposed
 17 order granting preliminary approval.) It provides the definition of the classes, describes the
 18 nature of the action, including the class claims, and explains the procedure for making comments
 19 and objections. The Class Notice describes the terms of the Settlements with Epson and
 20 Chunghwa, and informs class members that there is no plan of distribution at this time. The Class
 21 Notice provides the date, time, and place of the final approval hearing, and informs class
 22 members that they may enter an appearance through counsel. The Class Notice also informs class
 23 members how to exercise their rights and make informed decisions regarding the proposed
 24 members how to exercise their rights and make informed decisions regarding the proposed

25
 26 ³ The settlement requires Epson to provide the names and addresses of putative class members, to
 the extent that information is reasonably available to Epson. Agreement, ¶ 9. Epson has already
 27 provided such a list to Plaintiffs’ counsel. Fastiff Decl., ¶ 10. In addition, Plaintiffs have
 requested from the non-settling defendants a list of all of their customers who are potential class
 28 members. Such lists will facilitate the dissemination of “the best notice practicable under the
 circumstances.” Fed. R. Civ. P. 23(c)(2)(B).

1 Settlements, and tells them that if they do not opt-out, the judgment will be binding upon them.
 2 The Class Notice further informs the class about the payment of attorneys' fees and costs to Class
 3 Counsel. This easily meets the standards for Class Notice. *See, e.g., Mendoza v. United States*,
 4 623 F.2d 1338, 1351 (9th Cir. 1980) ("very general description of the proposed settlement"
 5 satisfies standards).

6 **VI. PROPOSED PLAN OF ALLOCATION**

7 A plan of allocation of class settlement funds is subject to the "fair, reasonable and
 8 adequate" standard that applies to approval of class settlements. *In re Citric Acid Antitrust Litig.*,
 9 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001). "A plan of allocation that reimburses class
 10 members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*,
 11 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994). Here, Plaintiffs propose that settlement funds
 12 be allocated based on the dollar value of each class member's TFT-LCD product purchases in
 13 proportion to the total claims filed. Such *pro rata* distributions are "cost-effective, simple and
 14 fundamentally fair." *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285 (D.
 15 Minn. 1997). The value of computing a more precise allocation would be outweighed by the
 16 administrative expense in doing so. Thus, the allocation plan is fair, reasonable, and adequate.

17 As with the Chunghwa settlement, Plaintiffs propose that distribution of settlement
 18 funds be deferred until the termination of the case, when there might be additional funds to
 19 distribute, because piecemeal distribution of each settlement is expensive, time-consuming, and
 20 likely to cause confusion to class members. Until that time, the settlement funds will accrue
 21 interest for the benefit of the class. Deferring allocation of settlement funds is a common practice
 22 in cases where claims against other defendants remain. *See Manual* § 21.651.

23 **VII. ATTORNEYS' FEES AND COSTS**

24 The Agreement states that Class Counsel may apply to the Court for
 25 reimbursement of litigation expenses incurred and to be incurred, out of the settlement fund, and
 26 Epson has agreed not to oppose any such request. Agreement, ¶ 23. Prior to the final approval
 27 hearing, Plaintiffs and their counsel will move for the creation of a litigation expense fund in the
 28 amount of \$3 million for the payment of litigation expenses that have been incurred, and will be

1 incurred, in prosecuting this case. Of course, any unused portion of that fund will be distributed
 2 to the class. Such litigation expense funds have been established and approved in other class
 3 actions. *See, e.g., Newby v. Enron Corp.*, 394 F.3d 296, 303 (5th Cir. 2004) (affirming approval
 4 of class settlement where \$15 million of settlement proceeds were used to create a litigation
 5 expense fund); *In re Cal. Micro Devices Sec. Litig.*, 965 F. Supp. 1327, 1337 (N.D. Cal. 1997)
 6 (approving class counsel's request for a \$1.5 million litigation fund “[b]ecause the remainder of
 7 the case appears to have potential value for the class”). Plaintiffs' request for a litigation expense
 8 fund is explained in the proposed Class Notice.

9 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING SCHEDULE**

10 The last step in the settlement approval process is the final approval hearing, at
 11 which the Court may hear all evidence and argument necessary to evaluate the proposed
 12 settlement. At that hearing, proponents of the settlement may explain and describe its terms and
 13 conditions and offer argument in support of settlement approval and members of the settlement
 14 class, or their counsel, may be heard in support of or in opposition to the settlement. Plaintiffs
 15 propose the following schedule for final approval of the settlement:

	Deadline	Action
17	1. Date to be set after preliminary approval is granted	Mailing and publication of Class Notice
18	2. 60 days after the mailing of notice	Last day for settlement class members to opt-out of the settlement and any class member to file objections to the settlement
19	3. 30 days after Settling Defendants receive list of opt-outs	Last day for Settling Defendants to rescind settlement
20	4. 15 days after last day for Settling Defendant to Rescind Settlement	Final Settlement Approval Hearing/Fairness Hearing

25 **IX. CONCLUSION**

26 Based on the foregoing, Plaintiffs respectfully request that the Court: (1) certify
 27 the proposed Epson settlement class; (2) grant preliminary approval of the class settlement with
 28 Epson; and (3) establish a deadline for class members to exclude themselves from the settlement,

1 a deadline to submit any objections to the settlement, and a final approval hearing date.

2 Dated: July 12, 2010

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18 *Class Counsel for the Direct Purchaser Plaintiff Class*

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20 Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the
21 filing of this document has been obtained from Bruce L. Simon.

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